No. 280.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING CO.

Plaintiff in Error,

vs.

ALTOONA QUICKSILVER MINING CO.

Defendant in Error.

Petition for Rehearing of Plaintiff in Error.

E. W. McGRAW,

of Counsel for Plaintiff in Error.

Filed June ...., 1896.

FILED
JUN 27 1896

Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

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MINING COMPANY,
Plaintiff in Error,

vs.

ALTOONA QUICKSILVER
MINING COMPANY,
Defendant in Error.

PETITION FOR REHEARING OF PLAINTIFF IN ERROR.

To the Honorable, the Court aforesaid;

The plaintiff in error respectfully petitions for a rehearing in the above-entitled case upon the ground of errors in the opinion of the Court heretofore rendered in said case in the following particulars:

1st. Error as to the facts of the case as disclosed by the record.

2nd. Error in law in the opinion.

I.

As to the Errors of Fact.

From the opinion of the Court we extract as follows: "Upon a careful inspection of the testimony which is presented in the bill of exceptions, concerning the question of the abandonment of the water right by the defendant in error, we are unable to find that any witness testified to a continuous non-user of the ditch for a period of five years before the plaintiff in error took possession. There are several witnesses upon the subject and their testimony is more or less vague, and some of them testify to a non-user of a portion of the ditch at different periods, and in one instance for as long a period as ten years. Yet there is no witness who testifies that the whole of the ditch was unused by the defendant in error or by its tenants or lessees at any time continuously for five years."

We think there must have been some inadvertence of expression in the opinion as written above. Literally as it is written, it means that a party to an action cannot succeed unless he proves the whole of his case by one witness. We presume the Court meant to say that there was no testimony tending to prove the non-user of the ditch in question by the plaintiff for five years. But even as literally read the opinion is incorrect as to the facts. We did in fact prove by one witness the non-user of the whole ditch by plaintiff not only for five but for fourteen years prior to the entry of defendant in 1892, and for over fifteen years before this action was commenced in December, 1893.

Chas. Allenberg, plaintiff's witness, and the manager and superintendent of plaintiff, testified (Transcript p. 100)

" that all he ever did in relation to the Boston ditch " since 1878 was simply to claim it and think that at some " time he would use it for power."

The same witness emphasizes that testimony in the same page of the transcript wherein he explains as follows:

" That, when witness stated in his direct examination " that they had not previously used the water for water " power to run their machinery by water power, because " they had not been able to use the lower end of the Bos- " ton ditch, which would give them sufficient power to get " water power to move their machinery; what he meant " was, that inasmuch as the Integral Company had de- " prived them of Boston ditch, they could not certainly " make use of the lower end of the Boston ditch, that " is from the Integral mine down to the Altoona mine. " That the Integral Company, taking away the Boston " ditch from us, and not being able to get the water " through the Boston ditch, they could not get the water " from the head of the ditch down to the Altoona mine " for the purpose of getting water to run their machinery " with. The Integral works are near the Boston ditch, " between the head of the ditch and the Altoona Com- " pany's mines, *and when the Integral Company takes* " *the water, and uses it, from the Boston ditch, it does* " *not run through the lower part of the Boston ditch,* " *and the Altoona Company cannot get it.*"

In the complaint the ouster of the Integral Company is alleged to have been in August, 1893. (Trans. p. 3.)

The Integral Company first used the Boston ditch in July, 1892. (Testimony of McCaw, p. 106.) There

is no conflict in the testimony on that point. So, taking Allenberg's testimony as a whole, it means that his company, the plaintiff, made no use of the Boston ditch from 1878 to 1892, and after 1892 were prevented from using it by defendant.

Thus we have the direct testimony of the plaintiff itself—through its manager—that for fourteen years after 1878. it made no use of the Boston ditch.

There is abundance of other testimony tending to show a non-user for over five years. In fact as to use by the *plaintiff* of the ditch, the testimony is all one way—what little conflict there is in the testimony is as to use of the ditch by others than the plaintiff.

The question raised by this Court as to want of testimony of non-user of the *whole* ditch is a question raised by the Court and not by counsel for respondent.

If such a point properly existed in the case, it is quite certain that the able counsel for respondent would have discovered it. In fact, there is no such question properly in the case. There is abundant evidence of non-user at and below the Boston mine for over five years. There was never any claim at the trial that there was any place above the Boston mine where the water of the ditch could be used. All the evidence of user there was on either side was directed to user at and below the Boston mine. If the Court will look at the map, Exhibit 2, it will see that there is no mining claim above the Boston mine on the ditch. The only evidence there is in the case of the use of water from the Boston ditch by any one is:

1st. Its use at Boston mine by Boston Mining Com-

pany in 1876; by the plaintiff in 1878; by Butler from 1886 to 1889; and by defendant since 1892.

2d. Its use at Dolilffe mine by Butler in 1886–7. (The Dolliffe mine is the next mine below the Boston mine on the Boston ditch.)

3d. Its use by plaintiff on the Altoona and Trinity claims about 1876.

4th. Its use on the Loring claim by Loring. The dates of the user on that mine are the only dates as to which there is a conflict of evidence. Our evidence tends to show its latest use was in 1880. (The Loring claim adjoined the Trinity and Altoona on the west.)

The only place where plaintiff could possibly use water from the Boston ditch was at the lower end of the ditch, and, with one exception, there is no testimony whatever of any use by plaintiff except at that place. That exception is in Allenberg's testimony, who testifies (p. 85) that in 1878 the plaintiff used water from the Boston ditch in the Boston mine; but he also testifies (p. 78–9) that since 1878 the plaintiff had nothing to do with the Boston mine. So that testimony as to non-user of the lower end of the ditch by plaintiff is testimony tending to prove the non-user of any portion of the ditch. This use of the water in 1878 is the last use by the Altoona Company of the Boston ditch of which there is any testimony.

Their witness Littlefield says he does not think Boston ditch was used in 1879 (p. 37).

Girard, who was in employ of plaintiff from 1880 to 1888, and was at the mines from 1879 to 1894, says (p. 73): That the only year during that time when any

water ran through the Boston ditch down to the Altoona mine was in 1880. when it was used in the Loring claim. That during the whole time witness was there no water was ever used from the Boston ditch for mining in the Altoona or Trinity claims (pp. 76–7).

M. D. Butler, who was there from and after 1882, says from 1882 to 1886. there was no water in Boston ditch except that used by witness in Boston mine. That witness used the water in the Boston mine in 1886, 7, 8, and in portion of 1889 (p. 51). That from 1886 to 1892 the Altoona Company used no water from the Boston ditch for their own benefit (p. 52). Also, that when witness cleaned out and repaired the ditch in 1886 it had not been used for a great many years.

Cummings, who was there from the time the mines were discovered till 1881, and afterwards from 1886 to 1891, says during that period he saw water in Boston ditch below Boston mine on only one occasion—he don't recollect the year; that from 1886 to 1891 there was no water in the ditch below the Boston mine.

We submit that the above evidence amply tends to prove that the plaintiff in this case made no use of the Boston ditch from 1878 to the commencement of this action in 1893—a period of fifteen years; and that from 1880 to 1886, a period of six years, no use was made of it by any person under permission from plaintiff or otherwise, and that the opinion of this Court was based on an erroneous supposition as to the facts.

It was easy for the Court to be misled, as two ditches figure in the testimony: the Altoona or lower ditch and the Boston or upper ditch, the latter of which is the only

one in controversy. As to the lower or Altoona ditch it is a fact that the testimony does not show a cessation of use by plaintiff below for five years, and we doubt not that the Court has been misled by testimony which related only to the Altoona ditch.

II.

As to Errors of Law.

This case depends upon the construction and meaning of Section 1411 of the Civil Code of California, which was for the first and only time construed by the Supreme Court of California in the case of

Smith *v.* Hawkins, 42 Pac. Rep., 453,

not yet officially reported.

Using the language of the Supreme Court of the United States:

"The construction given to a statute of a State by the "highest judicial tribunal of such State is regarded as a "part of the statute, and is as binding upon the Courts "of the United States as the text."

Leffingwell *v.* Warner, 2 Black, 603.

In Smith *v.* Hawkins is the only construction of Sec. 1411 of the Civil Code of California. The previous case of Utt *v.* Fry was apparently decided by the Court in ignorance of the provisions of said Section 1411. Said Section 1411 is not discussed in the opinion, and apparently it was not brought to the attention of the Court. But even if it be considered as a construction of Section 1411 (which it was not), still the later construction in Smith *v.* Hawkins must govern.

In Leffingwell *v.* Warren (*supra*), the Supreme Court of the United States says:

"If the highest tribunal of a State adopt new views as "to the proper construction of such a statute, and re- "verse its former decisions, this Court will follow the "latest settled adjudications."

It is held in

Moores *v.* Cit. Nat. Bank, 104 U. S., 625,

that the construction given to a State statute by the Supreme Court of a State will be followed by the Supreme Court, in a case decided the other way by the Circuit Court before the decision of the State Court.

And the Supreme Court will overrule its own decisions as to construction of a State statute, where there is a subsequent decision of the State Court giving a different construction.

Green *v.* Neal, 6 Peters, 291.

Or when, at the time of rendering such decision, there was an existing decision of the State Court giving a different construction, of which the Supreme Court had not been informed.

Fairfield *v.* County of Gallatin, 100 U. S., 47.

So the doctrine of Smith *v.* Hawkins is necessarily the law of this case.

That case holds that a continuous non-user for five years, without or with an intent to abandon, will forfeit the right to a water ditch. When, therefore, the Court below charged the jury that "the mere intention to abandon, if not coupled with yielding up possession or cessation of user, is not sufficient, *nor will the non-user alone, without an intent to abandon, be held to amount* to an abandonment," it announced a doctrine which,

under no conceivable circumstances, could be correct, as applied to the title to a water ditch, a doctrine which, in this case, must have misled the jury, and which took from them the right to pass upon the question of continuous non-user for five years.

And when it charged the jury that "use of the ditch and water by any other person, by permission of the owner, is sufficient to maintain the owner's possession, as though it were used by the owner," it announced a doctrine at variance with that of Smith *v.* Hawkins, and therefore erroneous.

And when the Court refused to instruct, at our request, that non-use of the water by plaintiff since 1881 (this suit being commenced in 1893) was a forfeiture of any right to the ditch that the plaintiff previously had, it refused an instruction which was good law, and applicable to the case at bar under the doctrine of Smith *v.* Hawkins.

For these manifest errors the judgment should be reversed.

It is well settled that it is error in a Court to refuse to give an instruction which contains a correct statement of the law and is strictly applicable to the case.

Thorewegan *v.* King, 111 U. S., 549.

Douglas *v.* McAllister, 3 Cranch, 298.

Also that it is the right of each party to have an instruction on his theory of the case, if there be *any* evidence to support that theory, and that it is error for the Court to give an instruction which makes the case turn on one point only, when there are other grounds which should be passed on by the jury.

Adams *v.* Roberts, 2 Howard (U. S.), 486.
Ranney *v.* Barlow, 112 U. S., 207.
Fiore *v.* Ladd (Oregon), 36 Pac. Rep., 572.
Renton, Holmes & Co. *v.* Monnier, 77 Cal., 455.
N. Y. P. & N. R. Co. *v.* Thomas (Va.), 24 S. E. Rep., 264–5.
Eastman *v.* Curtis (Vt.), 32 Atl. Rep., 234–5.
Chicago H. L. Ass'n *v.* Butler, 55 Ill. App., 462.
Anderson *v.* Bath, 42 Maine, 346.
Sawyer *v.* Hannibal, etc., R. R. Co., 37 Mo., 240.
White *v.* Thomas, 12 Ohio St., 312.
Adams *v.* Capron & Co., 21 Maryland, 186.
Zabriskie *v.* Smith, 13 N. Y., 322.

The giving of an incorrect or inapplicable instruction, or the refusal to give a correct and applicable instruction, is reversible error, unless it affirmatively appears from the record that no damage could have resulted.

Beaver *v.* Taylor, 1 Wallace, 637–644.
Etting *v.* Bank of United States, 11 Wheat, 95.
Adams *v.* Capron, 21 Md., 186.
S. C., 83 Am. Dec., 571.
Busenius *v.* Coffee, 14 Cal., 93.
Richardson *v.* McNulty, 24 Cal., 346.
McDougal *v.* Cent. R. R. Co., 63 Cal., 434.
People *v.* Devine, 95 Cal., 231.

"We concede that it is a sound principle that no judg-
"ment should be reversed in a Court of Error when the
"error complained of works no injury to the party against
"whom the ruling was made. *But whenever the appli-*
"*cation of this rule is sought it must appear so clear as*

" *to be beyond doubt, that the error did not, and could not,*
" *have prejudiced the party's rights.*"

Deery *v.* Cray, 5 Wallace, 795–807.

" We repeat the doctrine of this Court laid down in
" Deery *v.* Cray, that while it is a sound principle that no
" judgment should be reversed on error when the error
" complained of worked no injury to the party against
" whom the ruling was made, it must be so clear as to be
" beyond doubt that the error did not and could not have
" prejudiced the right of the party. The case must be
" such that this Court is not called on to decide upon the
" preponderance of evidence, that the verdict was right,
" notwithstanding the error complained of."

Smiths *v.* Shoemaker, 17 Wallace, 630–639.
Gilmer *v.* Higley, 119 U. S., 99–103.
Boston and Albany R. R *v.* O'Reilly, 158 U. S., 335–6.

" But it was said by the Supreme Court of Montana,
" on appeal, that since the record did not contain all the
" testimony, the Court could not see that the defendants
" were injured by the refusal to have the questions an-
" swered.

" We have not before heard of such a rule in a revisory
" Court. *The furthest any Court has gone has been to*
" *hold that when such Court can see affirmatively that*
" *the error worked no injury to the party appealing, it*
" *will be disregarded.*"

Gilmer *v.* Higley, 110 U. S., 47–50.

We call the attention of the Court to the fact that in

this case the record does not purport to contain all the testimony, and that it is impossible for the Court to see affirmatively that no injury was done by the errors complained of.

A very late decision of the Circuit Court of Appeals of the 8th Circuit is also very much in point.

> Nat. Mass. Acc. Assn. *v.* Shryock, 73 Fed., 774–781.

As we have shown, there was evidence in the case tending strongly to show a non-user of the ditch by *any one* from 1880 to 1886, a period of more than five years, and a non-user by plaintiff from 1878 to 1893. We submit most respectfully that it was our right to have the jury pass upon that question of non-user, and that the question was certainly taken away from the jury by the Court below. This Court, in its opinion, speaks of user by tenants and lessees of plaintiff. We think the question of tenants and lessees of plaintiff unimportant, as our testimony tended to prove a non-user by *any one* for over five years, but we call the attention of the Court to the fact that the Supreme Court of California in Smith *v.* Hawkins held that a person could not prevent the loss of right from non-user by leasing the same and allowing other persons to use it. In this case as to one of the alleged tenants, Butler, the license he received was not binding on him. He entered on the ditch in 1886, at which time it had been used by no one for over five years and consequently was owned by no one. At some indefinite time after 1886 he accepted a license from plaintiff

to use it, but as he did not enter under the license, he could on familiar principles contest the title of plaintiff.

Davis *v.* McGrew, 82 Cal., 135.

Davidson *v.* Ellmaker, 84 Cal,, 21.

It is manifest that if plaintiff had forfeited its right to the ditch by non-user, it could acquire no new title by leasing the ditch, and that a lease which as against its tenant would not be evidence of title, could have no weight as against third parties.

III.

This Court ignores our exceptions to the admission of evidence. The exceptions were taken and argued in good faith, and we believe them well founded.

Since this case was submitted we have noticed a decision of the Supreme Court of the United States which has a direct bearing upon one exception to the admission of testimony.

Our Assignment of Error XXXVI (Brief p. 24) is as to the overruling by the Court of our objection to the following question asked by plaintiff of the witness Allenberg.

"What amount of money was expended by the
"Altoona Quicksilver Mining Co. in the operation and
"development of its properties in the Cinnabar Mining
"District in Trinity County, California, from the time the
"company took possession of the property up to the
"commencement of this suit?"

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court. (Transcript, pp. 96, 97.) To which ruling counsel for

defendant then and there duly excepted. Answer of witness: "About $257,000."

We insisted on this assignment in our argument. (Brief p. 50.)

On December 23rd, 1895, the Supreme Court decided an ejectment suit for a mining claim and in the opinion the Court says:

"Lastly it is contended that the District Court erred
" in permitting the plaintiff to prove that it had expended
" between $7.000 and $8,000 in working the mines from
" the time it took possession until it was ousted there-
" from by the defendant Haws. This testimony was
" offered to show good faith in working the property by
" the plaintiff company. We think it was competent *in*
" *view of the requirements of the U. S. Rev. Stat.*,
" §2325, *that on each claim located after May* 10, 1872,
" *and until a patent has been issued therefor*, *no less than*
" $100 *worth of labor shall be performed*, *or improve-*
" *ments made during each year*."

> Haws *v.* Victoria Copper Mining Co., Advance Opinions Lawyers Co-Op. Pub. Co., Jan. 15, 1896. No. 5, p. 316, 321.

This opinion cannot be otherwise construed than as holding that, except for the statute aforesaid, the evidence would have been inadmissible.

In the present case the question is embarrassed by no such statute. The thing in controversy was a water ditch which had not been used in connection with the mining properties inquired about, since 1876, over 17 years before suit was brought.

We again respectfully submit that the admission of the testimony was error, and that the Supreme Court in effect so decides.

We ask the Court to examine our brief as to other questions of evidence discussed.

Respectfully submitted,

E. W. McGRAW

Counsel for Plaintiff in Error.

UNITED STATES OF AMERICA,
Northern District of California, } ss.

I, E. W. McGraw, counsel for the plaintiff in error in the above-entitled case, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded in fact and in law, and that the same is not interposed for delay.

San Francisco, June 26, 1896.

E. W. McGraw